R. G. Barry Corporation *and* Local 45, International Molders and Allied Workers Union, AFL-CIO.
Cases 9-CA-15974 and 9-RC-13482

February 10, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On September 29, 1981, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, R. G. Barry Corporation, Canal Winchester, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election conducted on October 23, 1980, in Case 9-RC-13482 be, and it hereby is, set aside and this case is hereby remanded to the Regional Director for Region 9 for the purpose of scheduling and conducting a second election at such time as he deems the circumstances permit a free choice on the issue of representation.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: The hearing in this consolidated proceeding was held on August 12, 1981, in Columbus, Ohio, based on an unfair labor practice charge filed against R. G. Barry Corporation (herein called the Respondent), by Local 45, International Molders and Allied Workers Union, AFL-CIO (herein called the Union), and a complaint issued by the Regional Director for Region 9 on November 28, 1980, and the Regional Director's Supplemental Decision and Order consolidating cases and notice of hearing issued on December 3, 1980. (All dates herein are 1980 unless otherwise noted.) The complaint alleges that the Respondent violated Section 8(a)(3) of the Act on or about October 13, 1980, by issuing written warnings to four employees for ". . . soliciting concerning the Union on company time, which contained a threat of suspension or termination for the next ensuing violation of Respondent's rules, all contrary to the Respondent's established policy with respect to progressive discipline . . . ." The Respondent filed an answer which denied the commission of unfair labor practices.

Pursuant to a Decision and Direction of Election issued by the Regional Director on September 30, an election by secret ballot was conducted on October 23, 1980, among certain employees of the Employer to determine whether such employees desired to be represented by the Union for the purposes of collective bargaining.[1] Upon the conclusion of the election, a tally of ballots disclosed the following results:

Approximate number of eligible voters	112
Void ballots	3
Votes cast for the Petitioner	21
Votes cast against the Petitioner	85
Valid votes counted	106
Challenged ballots	1
Valid votes counted plus challenged ballots	107

On October 28, the Petitioner timely filed objections to conduct affecting the results of the election. Thereafter, the Regional Director conducted an investigation of the objections. On November 26, the Union, upon approval of the Regional Director, withdrew 17 of 19 objections that it had alleged.

Objections 6 and 8 were consolidated for hearing with the unfair labor practice case by the aforedescribed Supplemental Decision. Objection 6 parallels the unfair labor practice allegation. Objection 8 alleges:

> The Employer allowed employees known to the Employer to be opposed to Petitioner to engage in campaign activities against the Petitioner on the Employer's time, during work hours at the Gender

[1] The Decision sets forth the appropriate bargaining unit as follows: All production and maintenance employees employed by the Employer at its 59 Gender Road, Canal Winchester, Ohio, facility, excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

Road facility, to discourage selection of the Petitioner as the bargaining representative of the employees.

Post-hearing briefs were submitted by all parties.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, and after an evaluation of the inherent probability of their testimony and consideration of briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material herein, the Respondent, a Delaware corporation, with an office and place of business in Canal Winchester, Ohio, has been engaged in the manufacture and sale of footwear. During a representative period the Respondent, in the course and conduct of its business operations, purchased and received at its Canal Winchester, Ohio, facility, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio.

It is admitted, and I find, that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Preliminary Issues*

At the hearing, the Respondent moved to dismiss the complaint on the grounds that it does not on its face allege conduct violative of the Act and that the Board agent during the investigation of the objections and unfair labor practices made statements to the Respondent's agents indicative of a personal belief that a hearing would inevitably result, thereby revealing the agent's bias and prejudice. As to the first part of the Respondent's motion, the complaint clearly alleges a discriminatory treatment of employees because of union activities. As to the second portion of the motion, it is unnecessary for me to decide whether the issue of bias of a Board investigator is relevant to the issues before me, or whether the alleged conduct in fact reveals bias, inasmuch as the Respondent sought to adduce no evidence in support of the motion. Accordingly, the motion is denied.

B. *Background*

The Union commenced its organizational activities of the Respondent's Gender Road, Canal Winchester, plant in the late summer of 1980. The employee organizing committee consisted of 10 employees. Four of those employee organizers are the alleged discriminatees herein: Charles Davis, Samuel Martin, Kevin Dye, and Theodore F. Zaucha. They constituted four of the five employees assigned to work in the mold department. As organizing committee members, the alleged discriminatees engaged in activities in support of the Union commencing that summer which consisted of solicitation of coworkers to sign authorization cards, holding of employee union meetings, and dissemination of union information to fellow employees. Davis, Dye, and Zaucha wore union-organizer identification badges on their person during work hours.

The concentration of prounion activists in the mold department caught the attention and concern of the Respondent as is evidenced by the mid-September meeting held in a plant conference room with the molders by Plant Manager Robert Rupp, and Human Resource Managers Richard Smith and Donald Huey.[2] At that meeting, Rupp discussed the union organizing effort and asked what the employees had to gain by unionization and what complaints they had. Various employee complaints were raised, but the primary expressed employee concern was the molders' wage level. The testimony of the discriminatees varies as to whether Rupp promised to reevaluate their grade level with a resultant upgrading and higher wage level, or whether he told them that such an evaluation had already been planned but was deferred because of the pending union organizing effort, or whether he merely stated that the Respondent was "thinking" about a job reevaluation. As to other complaints, notes were taken by one manager and the employees were told that the Respondent "would check into it."

Further attention was given by the Respondent to the mold shop employees early on the morning of October 13, when they were addressed in a meeting by Huey, Smith, and Mold Making Manager Robert Jalbert. At that meeting, Huey told the molders, according to Dye's uncontradicted testimony, that they were interrupting the whole plant. All discriminatees testified that the molders were then told by Huey that in the future they had to request permission of a foreman before they could leave the mold department for any reason, including work tasks, or personal needs. The discriminatees testified that in the past they had frequent occasion to leave the department for work related and personal reasons and were never required to ask for permission nor to give notice to a supervisor.

Huey did not testify with respect to this meeting. Smith testified that the mold employees were indeed instructed at that meeting by Jalbert to seek explicit permission before they left their department. Jalbert did not testify. Smith testified in vague terms and with uncertainty in demeanor that such restriction is a normal rule; i.e., "I think that's normal in every department . . . they generally do . . . I would certainly think so [regarding the mold shop] . . . I believe they generally do." When asked whether the molders in actual past practice sought permission to move about the plant, he answered: "I don't know. I—I would like to say that this again was not my responsibility for the administration of personnel

[2] The discriminatees' testimony as to what transpired is uncontradicted. The General Counsel and the Union declined to take a position that such evidence was proffered as evidence of an unfair labor practice or of election interference.

functions in the mold shop. That is Mr. Huey's responsibility—and Mr. Jalbert's." His demeanor was as uncertain as his testimonial responses. Finally, when faced with his contradictory pre-trial affidavit, he retracted his testimony to the effect that similar meetings were held in other departments for the purpose of restricting employee movement. Thus I find that the discriminatees' testimony stands as uncontradicted by credible testimony, as I find Smith to have been an unreliable witness. Accordingly, on Monday, October 13, the Respondent placed unique restrictions upon the extra departmental movements of the molders for no demonstrable business reasons.[3]

C. *Solicitation—Distribution Rules*

Upon their entrance on duty, the Respondent presents to its employees, whom it refers to as "associates," a handbook in which is set forth the Respondent's employment policies, rules called "Guidelines," and a progressive disciplinary system. The basic objective for the Respondent's guidelines and system of progressive discipline as described in the handbook and the testimony of Manager Huey is that of correction and rehabilitation through counseling.

Guideline 3 states, *inter alia*:

> It is important that we do not interfere with our fellow Associates while they are working. Therefore, we do not permit solicitation for any reasons whatsoever on company time. Anyone who solicits on company time, or who bothers an Associate who is supposed to be working, is not acting in the best interests of our team effort. Such behavior will not be permitted.
>
> Each of us has a responsibility for the morale of our fellow teammates. Gossip or other insulting remarks only serve to destroy our team spirit.

Also set forth in the section entitled "Miscellaneous," under the heading "solicitations" is the following language:

> It is neither fair nor right to interfere with a fellow Associate who is working. Therefore, anyone who engages in any kind of soliciting on the job, and who thereby neglects his/her work, or interferes with someone else's work, will be subject to disciplinary action.
>
> Outsiders will not be permitted to come upon company premises to solicit Associates. Nor may Associate engage in solicitation during working time, when either of the persons involved is supposed to be working. The distribution of any kind of leaflets, literature, etc., in working areas cannot be tolerated.
>
> Your breaks and lunch periods are yours to use as you wish. However, the company cannot and does not permit any form of soliciting of or by Associates during working time.

The progressive disciplinary system states that violation of a guideline will result in warning, counseling, a plan for corrective action, and a time schedule to meeting the "goals" of that plant. However, an exception is set forth for a "serious violation" which can "result in immediate discharge." The "Guide for Corrective Action" states as follows:

> Corrective action will be taken if you fail to live up to the plan for improvement that was suggested at the counseling session.
>
> The following Guidelines for Corrective Action are to be used only after the supervisor has counseled the Associate on previous operational Guidelines infractions. However, if the infraction is of a very serious nature, such as fighting or theft, the Associate could be dismissed immediately.
>
> What happens after counseling?
>
> 1st Infraction—The supervisor will explain the infraction in detail to the Associate and prepare a written warning. This warning will include a plan of action to correct the problem.
>
> 2nd Infraction—The supervisor will prepare a second written warning and discuss it with his/her manager. A meeting will be held with the Associate, the supervisor and the manager to discuss the infraction in detail and to plan a course of corrective action.
>
> 3rd Infraction—After a discussion between the supervisor and the manager, a third warning will be prepared and discussed with the next higher level of management. At this time a meeting will be held with the Associate, supervisor and managers to determine what course of action should be taken, including the possibility of termination.
>
> The intent of this policy is to provide counseling and feedback by the supervisor with the Associate. Part of this feedback is the setting of goals and timetables to reach these goals. We realize that there will be situations and/or individuals who do not respond to our hope that they will put forth their best effort in their job.
>
> If management determines that an Associate is not meeting the basic job requirements and that problem areas have not been resolved, a plan for corrective action will be designed to handle the Associate's specific problem.

Manager Huey testified that it is the norm to follow the progressive disciplinary system, but that serious misconduct can result in immediate discharge, as is noted in the handbook itself. Thus Guideline 6 states:

[3] The General Counsel adduced evidence concerning the foregoing mold department meetings, in part with testimony of an adverse witness, explicitly for the sole purpose of establishing union animus relevant to the issue of the alleged discriminatory treatment of union supporters. The General Counsel disavowed any intention to adduce such as evidence of an unfair labor practice. The Union similarly disavowed any intention of alleging it as evidence of election interference. The Respondent's objections to this evidence on grounds of relevancy were overruled, and it was received for the limited purpose expressed by the General Counsel. Based upon the foregoing positions of the General Counsel and the Union, the Respondent adduced no rebuttal testimony.

> The basic ingredient of teamwork is the honesty of our Associates. We expect each Associate to act in a trustworthy, honest and moral manner in their relations with each other and with the company. For this reason, committing any one of the following acts will result in immediate termination:
>
> Unauthorized possessions of company product or the property of another Associate.
>
> Willful destruction of the company's or an Associate's property.
>
> Fighting or using threatening language.
>
> Gambling during working hours and on company premises.
>
> Possession or use of alcohol or illegal drugs or working under the influence of either.
>
> Possession of firearms or illegal weapons on company property.
>
> Smoking in unauthorized areas.
>
> Sleeping on the job.
>
> Unauthorized use of company equipment or vehicles.
>
> It may seem needless to list the above acts. But in order for us to make sure we are providing you with a safe, secure and healthy work area, we feel we must make it clear that such acts will not be tolerated.

Elsewhere in the handbook on page 16, the marking, altering, removing, or handling of another employee's timecard is referred to as a "serious offense," but discipline is not described.

D. *The Reprimands*

On October 13, subsequent to the aforedescribed mold shop meetings, individual disciplinary meetings were held in the conference room at the plant by Huey, Smith, and Jalbert at which meetings Zaucha, Davis, Martin, and Dye were presented each with a written warning form. The entries on each form were identical. The "Description of Infraction" was defined only as "violation of Guideline 3 regarding interfering with fellow associates of their work, specifically soliciting concerning the Union on company time." In the space designated "Pertinent Discussion (state all facts, times and dates of occurrence)" was the following:

> Based upon a specific complaint from associates(s) that they were talked to regarding supporting the union while on company time. Complaint filed with Human Resource Department (name(s) of complainant withheld to promote harmony).

After the heading "action taken (state goals, timetable, and follow up plans)" was the following: "The next violation of this guideline can result in suspension or termination." The form was signed by Manager Jalbert and the president of manufacturing, Art Laganus, and reflected that it was the first warning received by the employee in the past 6 months. Indeed, this was the first such warning for violation of Guideline 3 ever received by the four molders.[4]

Huey testified that it was his decision to issue the warnings and it was he who composed them. He testified that when he presented the warnings he asked the recipients for their version. Inasmuch as he did not identify the other employees involved, and gave to them no details or dates of the alleged misconduct, quite naturally the molders were unable to respond. Just what further statements Huey made at this meeting is unclear. None of the molders recall anything being stated beyond what the form disclosed. Huey testified that he told them individually that the complained-of incident occurred within the preceding week, that he had received formal complaints, that he could not disclose the names of the complainants because of their "fear" and "because of the things they had said to me." Huey testified that he told the four molders:

> . . . the next violation of that guideline, which has to do with interfering with other associates at work, including harassing, gossiping, intimidating, or soliciting that, yes, it would result in suspension or termination.

The written formal warnings which form the basis for future discipline, however, are phrased much more broadly as they refer to "the next violation of this guideline . . ." which would include violations short of intimidation or harassment of coworkers but are limited to purported solicitations "concerning the union on company time," as forming the conduct of interference with fellow employees' work.

Huey's handwritten notes dated October 10, concerning his interviews with Zaucha, Martin, Davis, and Dye, do not reflect any discussion of harassment or intimidation but are limited to references of "solicitation of an associate on company time." His note of the Dye interview reflects that Dye could not respond "because he didn't have the specific situation."

Huey testified that the complaints of two female employees, Dottie Harrop and Rose Beach, prompted these warnings. He testified that the complaints were made on October 13, the same day as the warning issuance. This testimony contradicts Huey's sworn affidavit submitted to a Board agent during the investigation of the case wherein he stated that those complaints were made on October 16. At the hearing he testified that October 16 was the date that he "actually wrote up the notes" of the complaint interview, and that he erred because the Board agent discouraged him from resorting to notes not in his immediate possession. He testified that also on October 16 the original handwritten notes were typed into summaries. The summaries are dated October 16. The summary regarding Harrop states that Harrop made her complaint on the date of the summary, i.e., "this afternoon." Beach's summary is dated October 16. Both employees complained on the same date.

[4] Huey testified that the Respondent has on occasion taken cognizance of prior warnings for a 1-year period.

Harrop's summary reflects that she complained of an incident that occurred a week earlier when she had occasion in the course of her duties to enter the mold shop when Zaucha "started in on her" about union cards he had given her, that "Charlie [Davis] and Ted [Zaucha] came up and grouped" around her, and that "Ted got mad and threw some things down and was hitting a pipe of something"; that she told them that her union feelings were private and that "they called [her] a stupid, silly broad and some other names," and that she pushed her "way out of there." She also purportedly recited that Rick Young, the fifth molder and nonorganizer, later told her that Davis was "mad" and that Young was "kind of afraid there for a minute of what [Davis] might do." She is quoted as saying that, "Since then the three of them come by and make comments to me when they see me." There was no reference to Kevin Dye in that summary.

The summary concerning Rose Beach set forth that Zaucha had been "bothering" her and made "comments" to her "in front of the" plant bulletin board and "while at lunch." The summary further stated that she complained that "it started" the prior week when Zaucha came to the shipping department and solicited her signature for a union card in a 10-minute conversation while she attempted to work and was joined by Martin who "started in on" her, at which point Zaucha told her "to go to hell," and told her that she did not know what she was talking about. She noted that Young was nearby and that he observed the conversation but took no part in it.[5]

Neither Harrop nor Beach testified in this proceeding nor did Young. Huey's testimony as to Harrop's and Beach's complaints considerably embellished upon his summaries of October 16 and contains stark inconsistencies. He testified that Beach had complained that she also was called names and was threatened, or "that's my understanding from her." He also testified that Harrop complained that she was "surrounded" by *four* associates in the mold shop who "yelled" and "screamed" at her.

Huey testified that Harrop and Beach were presented with the written summaries of the event and explicitly agreed with it. Presumably, this occurred, if Huey is to be credited, 3 days after the reprimands, since he had testified that he did not even write up notes until October 16. Huey testified that he responded to Harrop and Beach that "we could not do anything, that we—there were no managers, or anyone else that saw those particular events," and that it was necessary for them to file formal complaints in order for the Respondent to take any actions. Huey does not explain the inconsistency between his testimony of what Beach and Harrop told him and what is set forth in the typewritten summaries. He does not explain why Rick Young was not considered to be a witness to these events. He does not explain why Dye was not referred to at all in the written summaries, why the yelling and screaming was not mentioned, why there is no reference to threats or name-calling in Beach's summary.

[5] There is no evidence that the Respondent interviewed Young concerning these alleged incidents.

Zaucha, Martin, Davis, and Dye all testified concerning these alleged incidents. Their testimony is uncontradicted and credible. Zaucha testified that Harrop came into the mold department twice a day, that they frequently joked with one another, that he and others often taunted her jokingly as a "dumb broad," that he had given her a union card in the cafeteria and had asked her about signing it in the mold department and called her a "dumb broad" when she refused, and that she laughed in response. He testified that in the course of his job he does do some hammering but that he did not throw anything at or near her. As to Rose Beach, he admitted that he had engaged in a conversation with her on the job in an aisleway and had asked her to sign a card but that upon misunderstanding her, he gave her a card which she rejected and that he did respond "go to hell," which is an expression often used by both of them as common shop talk. He denied uttering any threats, or that Harrop was surrounded in the mold shop.

Martin testified that with respect to the Harrop incident he got involved at the end of the conversation and participated for 90 seconds but did not threaten her. He testified that he invited Beach to a union meeting but did not ask her to sign a union card. He denied making any threat to Harrop or Beach. Davis testified that Harrop often came to the mold department but could recall no specific conversation regarding a union card. He denied threatening Harrop, or preventing her departure from the mold shop. He admitted engaging a conversation with Beach in the plant aisle and that he had asked her several times to sign a union card as they encountered each other in the plant. He denied ever threatening her, or that he called her any name.

Dye admitted that he had asked Harrop to sign a union card on several occasions and had discussed it with her for a few minutes at a time. Dye recalled the Harrop incident but testified that it involved a "lot of joking." He testified that he was engaged in work during the incident and denied preventing her departure. As to Rose Beach, he testified that he knew her well and had dated her and discussed the Union with her privately after work but not in the plant.

E. *Distribution of Antiunion Materials*

On Friday, October 10, copies of antiunion news clippings were placed in the lunchroom in the morning during work hours by janitors Donaldson and Harrington. A copy was also posted by employee Lil Nelson on a wall near her work station about 7:15 a.m. where it remained until 2 p.m.

On Monday, October 13, Dye formally complained to Manager Smith about these postings. Smith investigated and issued formal warnings to Donaldson, Harrington, and Nelson on October 13 for violation of Guideline 3 based upon distribution of antiunion leaflets "during working hours." The reprimands constituted a first warning and stated "this serves as an official notice that solicitation for any reason whatsoever on company time cannot be permitted." The warnings contained no statement that a further violation could result in suspension or termination. The Respondent distinguishes the situa-

tion involving these three employees from that of Zaucha, Martin, Davis, and Dye, in that it contends the latter involved serious misconduct.[6]

There is no evidence of supervisory authorization or participation in the antiunion postings. Smith's testimony suggests that he assumed that the janitors, who as part of their duties have free access to all parts of the plant, utilized the Respondent's copying machine in that he asked Donaldson whether or not he had obtained permission to use the copy machine and Donaldson responded that he did not. Smith testified that he first saw a copy of the antiunion posting on Monday October 13 when he asked one of the janitors for a copy. The machine is located in an office within view of Smith's secretary but there are times during the day when no one is present in that office. Dye testified that when he held the position of lead operator in the past, he often used the machine to reproduce material for business and personal reasons and that "no one minded."

Huey testified that on Monday October 13 at 9:30 a.m., he noticed an antiunion cartoon on a wall near Nelson's work station. He questioned a supervisor whether he had observed who had posted it, but the supervisor did not know. There were no employees nearby. As to the antiunion newsclipping he testified that he first became aware of these when Smith showed him a copy on the 13th in the afternoon and told him that a "bunch of them" were found in the cafeteria and were being thrown away. He testified that he told Smith to investigate and 20 minutes later Smith returned and said he did not know who had done it. Inexplicably, Huey, who was aware of Dye's complaint concerning the janitors and Lil Nelson, did not connect the matter with these clippings. Smith, as noted above, testified he first saw a copy of the antiunion clippings on the afternoon of October 13 in consequence of his investigation of Dye's complaint.

F. *Analysis*

The General Counsel does not allege or argue that the Respondent's solicitation and distribution rules are presumptively invalid.[7] Furthermore, the General Counsel does not allege that the Respondent's enforcement of its solicitation rule, *per se*, was discriminatory. Rather, the General Counsel concedes the propriety of the issuance of the October 13 warnings but argues that the imposition of the "modicum" of punishment to Zaucha, Martin, Davis, and Dye was discriminatory, i.e., the warning of suspension or termination, because it deviated from the progressive disciplinary system which, as applied to antiunion violators, entailed only a further step-two warning for such rule violation. Therefore, what has been litigated herein as an unfair labor practice was not the imposition of the October 13 warning *per se*, but the issuance of a warning of suspension or termination for further violation.

I conclude that the General Counsel has proven herein that the alleged discriminatees were union activists, that the Respondent was adverse to the unionization of its employees, and that the alleged discriminatees received punishment for engaging in union activities in violation of work rules but that the punishment exceeds the type of punishment prescribed by the Respondent's normal progressive disciplinary warnings.

The formal warnings issued to Zaucha, Martin, Davis, and Dye, and placed in their personnel files, and upon which future discipline was to be premised, are founded only upon violation of Guideline 3 in that they engaged in union solicitation during working time. There is no reference to other misconduct. The written warning postulates future suspension or termination upon violation of Guideline 3, not upon future acts of misconduct in the nature of intimidation or threats to other employees. The disciplinary warnings are on their face contrary to the Respondent's progressive disciplinary system which was complied with in the case of antiunion activity.

The Respondent contends, however, that it had reasonable cause to believe that in the course of violating Guideline 3, by engaging in union solicitation during working time, the four molders also engaged in serious misconduct; i.e., threats, name-calling, harassment, etc. No evidence was adduced by the Respondent to demonstrate that such conduct, if it had occurred, was of the same severity of misconduct which, according to past practice, compelled a deviation from the progressive disciplinary system. Respondent adduced no evidence whatsoever as to specific past examples of deviation from the normally applied progressive disciplinary system, nor specific examples of any situation where an employee was discharged for serious misconduct.

Only Guideline 6 calls for "immediate termination" for violations specifically set forth in that section. The use of "insulting remarks" is covered by Guideline 3. Of the conduct alleged to have been engaged in by the alleged discriminatees, only threats to coworkers are covered by Guideline 6. Furthermore, that guideline calls for immediate discharge and not a warning. Nothing in the October 16 typewritten summary of Rose Beach's complaint refers to threats. The October 16 typed summary of Harrop's complaint is ambiguous at best as to whether she was in fact threatened by word or deed of all four union activists in the mold department. The only person who suggested to Harrop, according to that memorandum, that one of the four might do something fearful was Rick Young in reference to Davis, and that in itself constitutes double hearsay and subjective surmise of Young, not Harrop. It is Huey's testimony of what Harrop and Beach supposedly told him that conjures up a scene of explicit threats. I am unable, however, to accept Huey as a reliable witness. I find it incredible that he would have erroneously fixed the date of the Harrop and Beach complaints, not only in his affidavit to the Board agent, but also when he executed the written summary which referred to the occasions as "this afternoon"; i.e., on October 16. Surely he was aware of the sequence of events, if

[6] During the year preceding October 13, no other warnings had been issued to any associate concerning solicitation or distribution of any kind.

[7] In *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981), the Board held that "rules prohibiting employees from engaging in solicitation during worktime or working time without further clarification, are, like rules prohibiting such activity during 'working hours' presumptively invalid," but refused to find a violation in that case because the respondent had not been put on notice by a supporting allegation in the complaint.

not the actual dates, when he executed those documents. Surely the date of the molders' discipline must have been at the forefront of his consciousness. He testified that he retained the Harrop-Beach summaries in the plant records, "in the event we ever had to use them," and that Harrop and Beach reviewed his notes. Yet, after that, no reference to explicit threats was inserted therein and no correction was made as to dates or other inconsistencies noted above. Furthermore, it is most unbelievable that Huey would not have made explicit references to threats, harassment, etc., in the written warnings issued to Zaucha, Martin, Davis, and Dye, or in the oral presentation had they in fact occurred, since that was supposedly the very gravamen of the extraordinary warning of suspension or discharge. I therefore do not credit Huey that he was in possession of the Harrop and Beach complaints prior to October 13, nor that Harrop and Beach told him that they were threatened.

In the final analysis, the Respondent meted out the unusual discipline of a warning of suspension or termination because of its purported belief that the four molders engaged in misconduct beyond mere solicitation during worktime. The Respondent has not established that in fact such misconduct occurred. The testimony of Zaucha, Martin, Davis, and Dye as to their conduct is uncontradicted and credible. I conclude, therefore, that the alleged misconduct did not occur. Furthermore, in light of the unreliability of Huey's testimony, the lack of any explicit reference to serious misconduct in the warning, the lack of any meaningful investigation, the lack of any counseling accorded to the affected employees required by the Respondent's personnel policies, I conclude that on October 13 the Respondent did not even possess a good-faith belief that they had engaged in misconduct other than union solicitation during work hours. Therefore, I find that the Respondent deviated from its normal progressive discipline system and subjected Zaucha, Martin, Davis, and Dye to a more severe reprimand than that given to antiunion employees because of their activities on behalf of the Union and thus discriminated against them in violation of Section 8(a)(1) and (3) of the Act, as alleged in the complaint.

IV. THE OBJECTIONS

I do not conclude that the evidence supports the allegations in Objection 8 as alleged. I conclude that it ought not be sustained. There is no evidence that the Respondent instigated or authorized the distribution of antiunion material. There is insufficient evidence upon which to conclude that it knowingly acquiesced in the placement of such literature for the relatively short period of time involved on October 10.

The Union contends that the Respondent interfered with the election by its uneven application of solicitation and distribution rules to union and antiunion employees, and thus committed a separate and distinct violation of the Act from that alleged in the complaint which forms a separate instance of objectionable conduct. In essence, this contention is encompassed by the unfair labor practice issue litigated by the General Counsel. Disparity of treatment was rendered the prounion solicitors in that the normal discipline was applied to antiunion literature distribution whereas extraordinary punishment was afforded the prounion solicitors. The Respondent's plant rules were equally invoked, but the punishment was not equivalent. It cannot be cogently argued that the Respondent encouraged antiunion employees by applying its normal progressive disciplinary system to them. Rather, the General Counsel correctly urged that the Respondent discouraged prounion employees by meting out greater punishment than was normally prescribed.

The Union argues that inasmuch as the Respondent had violated Section 8(a)(1) and (3) of the Act during the critical preelection period, the election should be set aside. It is the policy of the Board to direct a new election whenever an unfair labor practice occurs during the critical preelection period inasmuch as conduct violative of Section 8(a)(1) of the Act is "*a fortiori* conduct which interferes with the exercise of a free and untrammeled choice in an election." *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786–87 (1962). An exception to this policy is that an election will not be set aside despite violative conduct when it is virtually impossible to conclude that such conduct could have affected the results of the election in light of such factors as isolation, triviality, nondissemination, and the small size of the unit. *Super Thrift Markets, Inc. t/a Enola Super Thrift*, 233 NLRB 409 (1977). Thus a supervisor's threat of discharge violative of Section 8(a)(1) of the Act may not, *per se*, require a new election, particularly when only one employee in a unit of 850 employees is affected. *Caron International Inc.*, 246 NLRB 1120 (1979); see also *Thermo King Corporation*, 247 NLRB 296 (1980) (involving a single threat in a unit in excess of 540 employees).

The Respondent's conduct herein was directed at four union activists who constituted 40 percent of the Union's employee organizing committee. It occurred about 10 days before the election and within a context wherein antiunion activists who had engaged in similar conduct were not subjected to the same threat of suspension or discharge. Such awareness of treatment of union activists to whom the Respondent had previously directed a display of union animus can reasonably be expected to have been disseminated to other employees. I, therefore, am unable to conclude that there was a virtual impossibility that the Respondent's violative conduct could have affected the results of the election. Accordingly, I must find that by violating Section 8(a)(1) and (3) of the Act, the Respondent interfered with the election.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By its conduct found violative of the Act in section III, above, the Respondent has discriminated, and is discriminating, in regard to the hire and tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

As to the objection in Case 9-RC-13482, I recommend that Objection 6 be sustained and Objection 8 be overruled.

THE REMEDY

Having found that the Respondent engaged in an unfair labor practice, I recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It is further recommended that the election in Case 9-RC-13482 be set aside and a second election directed.

Upon the basis of the entire record, findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, R. G. Barry Corporation, Canal Winchester, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Issuing written warnings to its employees concerning union solicitation on company time which contain a threat of suspension or termination for the next ensuing violation of its work rules contrary to its established policy with respect to progressive discipline because its employees have joined, supported, or assisted a union or engaged in other activity protected by the Act, and in order to discourage employees from engaging in such activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Rescind and expunge from all its records and files the October 13, 1980, warnings of future suspension and termination for the next ensuing violation of its work rule, known as Guideline 3, issued to employees Theodore Zaucha, Samuel Martin, Charles Davis, and Kevin Dye.

Post at its facility in Canal Winchester, Ohio, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT issue written warnings to our employees concerning union solicitation on company time which contain a threat of suspension or termination for the next ensuing violation of our work rules contrary to our established policy with respect to progressive discipline because they have joined, supported, or assisted a union or engaged in other activity protected by the Act, and in order to discourage our employees from engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them under Section 7 of the Act.

WE WILL rescind and expunge from all our records the October 13, 1980, warnings of future suspension and termination for the next ensuing violation of our work rule, Guideline 3, issued to employees Theodore Zaucha, Samuel Martin, Charles Davis, and Kevin Dye.

R. G. BARRY CORPORATION

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[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."